



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 933 of 2004

JOHN NYOIKE MUNGAIPLAINTIFF

V E R S U S

1. IRUNGU JOSPHAT GACHIE

2. PAUL KIIRU MACHARIADEFENDANTS

J U D G M E N T

The Plaintiff herein, JOHN NYOIKE MUNGAI, seeks damages on account of the death of his son, DOUGLAS CHARAGU (alias DOUGLAS CHARAGU NYOIKE) (hereinafter called the Deceased), costs and interest. The Deceased died in a road accident along the Nairobi-Thika highway. He was a passenger in motor vehicle registration No. KAN 086 S when it was involved in an accident with another motor vehicle, registration No. KAJ 088 N. It is pleaded that this latter motor vehicle was owned by the 1st Defendant, IRUNGU JOSPHAT GACHIE. It is further pleaded that at the time of the accident the motor vehicle was being driven by the 2nd Defendant, PAUL KIIRU MACHARIA, as servant or agent of the 1st Defendant. Finally, it is pleaded that the accident was caused solely by the negligence of the 2nd Defendant. Particulars of that negligence are given. Damages appear to be claimed under both the Law Reform Act, Cap 26 and the Fatal Accidents Act, Cap 32.

The 1st Defendant duly entered appearance and filed defence. The 2nd Defendant did neither and interlocutory judgment was entered against him on 30th March, 2006. At the hearing of the suit there was no appearance for the 1st Defendant; hearing notice had been duly served upon his advocates.

Only the Plaintiff testified. Needless to say, his testimony was unchallenged. He produced various documents in the course of his testimony. He brought the suit both as the legal representative of the estate of the Deceased, having obtained the necessary grant of representation (Exhibit P1), and also on his own behalf and that of his wife who was the mother of the Deceased. It is pleaded that both were the only dependants of the Deceased who is said to have been unmarried and without any child. I have considered the Plaintiff's testimony and the written submissions of counsel.

On the issue of liability, interlocutory judgment was entered against the 2nd Defendant who was the

driver of the motor vehicle that caused the accident. As against him, the issue of liability is settled by that interlocutory judgment. But on top of that, there is the fact that he was criminally charged with causing death by dangerous driving on account of the four deaths that occurred in the accident (including that of the Deceased). This was vide Nairobi CM Traffic Case No. 25406 of 2002. He was duly convicted and sentenced. See Exhibit P5. The Plaintiff was not an eye witness to the accident, and he could not trace any witnesses. I therefore permitted him to rely on the proceedings of the traffic case under section 34 of the Evidence Act, Cap 80. The negligence of the 2nd Defendant is thus fully established on a balance of probabilities, further to the interlocutory judgment already entered against him.

As for the 1st Defendant, he was the registered owner of motor vehicle registration No. KAJ 088 N at the time of the accident. See Exhibit P4, which is a copy of records of the motor vehicle issued by the Commissioner of Motor Vehicles. The evidence that the 2nd Defendant was the driver of the motor vehicle at the time of the accident is uncontroverted. I am satisfied on balance from the available evidence that he was the agent or servant of the 1st Defendant engaged in execution of his duties at the time of the accident. The 1st Defendant is therefore vicariously liable for the tort committed by the 2nd Defendant.

On the issue of liability, therefore, I will enter judgment for the Plaintiff against both Defendants jointly and severally at 100%.

I will now deal with damages.

Under the Law Reform Act

(i) Pain and Suffering: There is no evidence that the Deceased died instantly. An element of pain and suffering most likely preceded death. I will award KShs. 20,000/00 for pain and suffering.

(ii) Loss of Expectation of Life: The Deceased was a young man, only 26 years old at the time of his death. The conventional award under this head ranges between KShs. 70,000/00 and KShs. 100,000/00. I will award KShs. 85,000/00.

Under the Fatal Accidents Act

The Plaintiff and his wife, MARY WAMBUI NYOIKE (the Deceased's mother) were the only dependants of the Deceased. Although in his testimony the Plaintiff claimed this dependency at two-thirds of the Deceased's earning, this was unlikely. The Deceased was a young unmarried man. It is unlikely that he would have spent two-thirds of his earnings on his parents. Furthermore, the parents had land from which they must have derived some of their sustenance. The dependence was more likely at one-third and not two-thirds.

According to Exhibit P6, the Deceased was earning KShs. 750/00 per day as a contracted plant mechanic. He was not a permanent employee. Though Exhibit P6 is not an official document but merely a hand-written "to whom it may concern" note, the same has not been challenged. I will accept it. But the document does not state that the Deceased had jobs to do all the time. It says that he used to work on contract basis. That suggests that sometimes he would have work to do and other times he had none. It is unlikely that he worked full time for MFENA INDUSTRIAL SUPPLIES SERVICES. I will take it that he worked only three days in every week. His monthly income was therefore KShs. 9,000/00.

Regarding the appropriate multiplicand, the Deceased was aged 26 years at the time of his death. Being self-employed he could have worked passed the official retirement age for civil servant. But one must give allowance for the vagaries and uncertainties of life. I will therefore use a multiplicand of 25.

I will award under the Fatal Accidents Act KShs. 900,000/00 worked out as follows:

$$\text{KShs. } 9,000/00 \times 12 \times 25 \times 1/3 = \text{KShs. } 900,000/00.$$

This sum shall be apportioned as follows between the Deceased's dependants:-

Plaintiff: KShs. 600,000/00

Mary Wambui Nyoike: KShs. 300,000/00

KShs. 900,000/00

The Plaintiff is getting more because he has to meet the legal costs of these proceedings.

In the event, I hereby enter judgment for the Plaintiff against the Defendants jointly and severally for the total sum of KShs. 1,005,000/00. This sum will attract interest at court rates from the date of judgment until payment in full. The Plaintiff shall also get costs of the suit plus interest thereon at court rates from the date of filing suit.

Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 18TH DAY OF JULY, 2008

H. P. G. WAWERU

J U D G E